

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
: Case No. PF-U-22-27-E
: (PF-R-80-45-E)
MORTON BOROUGH :

FINAL ORDER

On May 12, 2022, Morton Borough (Borough) filed a Petition for Unit Clarification with the Pennsylvania Labor Relations Board (Board) seeking to exclude the position of Chief of Police from the bargaining unit of police officers as a managerial employe.¹ On June 10, 2022, the Secretary of the Board issued an Order and Notice of Hearing, directing that a hearing be held before a Hearing Examiner. The hearing was held on November 7, 2022, at which time the parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses, and introduce documentary evidence. Both parties filed post-hearing briefs.

On May 17, 2023, the Hearing Examiner issued a Proposed Order of Dismissal (POD). In the POD, the Hearing Examiner concluded that the Borough failed to present substantial, competent evidence to demonstrate that the position of Chief of Police is a management level position under the standard set forth in Fraternal Order of Police, Star Lodge No. 20 v. PLRB, 522 A.2d 697 (Pa. Cmwlth. 1987) (Star Lodge). In that respect, the Hearing Examiner noted that, pursuant to the Borough Code,² the mayor controls the day-to-day operations of the police department unless he or she delegates that authority to the Chief of Police. In determining that the Borough failed to establish that the Chief of Police exercises independent authority and discretion over any of the factors under the Star Lodge test, the Hearing Examiner stated as follows:

At the hearing in this case, the Borough offered only the testimony of John Miller, who is a Borough Council member and the Chairman of the Borough's Safety Committee, which oversees the Police Department. Mr. Miller is a knowledgeable, credible, and dedicated public servant and Borough Council Member. His testimony demonstrated that he has an extensive command and depth of understanding of Borough operations, as a Council Member. However, Mr. Miller's testimony also demonstrated a lack of first-hand knowledge of the Former Chief's or Acting Chief's alleged discretionary authority to independently initiate,

¹ On July 22, 1980, the Board certified Delaware County Lodge #27, Fraternal Order of Police as the exclusive bargaining representative for all "full-time and regular part-time Police Officers including but not limited to Patrolmen, Sergeants and the Chief of Police..."

² Act of April 18, 2014, P.L. 432, No. 37, 8 Pa.C.S. § 101-3501. Pursuant to Section 1123.1 of the Borough Code, the mayor "shall have full charge and control of the chief of police and the police force", and "may delegate to the chief of police ... supervision over and instruction to subordinate officers in the manner of performing their duties." 8 Pa.C.S. §§ 1123.1(a) and 1123.1(c).

develop, implement, or execute the Star Lodge functions on his own without acting at the direction or under the authority of the Mayor.

The Borough offered neither the testimony of the position holder, i.e., the Acting or Former Chief, or the direct manager/supervisor of the Chief and the Police Department, i.e., the Mayor. Although Council Member Miller credibly testified that the Chief recommended certain changes to the Council, which Council adopted, and that the Chief made recommendations for the police budget, the record does not show what involvement the Mayor had in those decisions. In fact, Mr. Miller was only able to testify that "to his knowledge" the Chief drafted Department policies. The record does not clearly establish that the Chief exercises independent authority and discretion over any of the factors listed in the Star Lodge test, or whether the Mayor exercises that authority, as the statutory manager of the Police Department. On this record, the Former or Acting Chief may have simply presented Department changes and budgets that were developed by the Mayor or with extensive Mayoral input.

The record is devoid of evidence related to the interaction between the Chief and the Mayor or which one of them actually exercises managerial authority over the Police Department. ... Council Member Miller was certainly competent to testify concerning the Borough Council's adoption of certain policies, budgets, or purchases recommended and presented to Council by the Chief. However, through no fault of his own, Mr. Miller lacked first-hand knowledge of how the decisions regarding policies, purchases, or budgets were made or who made them before the Chief presented them to Borough Council.

(POD at 4). Accordingly, the Hearing Examiner dismissed the Petition for Unit Clarification.

On June 6, 2023, the Borough filed timely exceptions and supporting brief challenging the POD. On exceptions, the Borough asserts that the Hearing Examiner erred in finding that the Chief of Police does not meet the Star Lodge test criteria, specifically budget formulation and purchasing role.³ The Borough further contests the Hearing Examiner's assertion that Council Member Miller did not have first-hand knowledge of the Chief of Police's authority and discretion in the operation of the Police Department.

The Commonwealth Court in Star Lodge, supra, delineated six criteria that would render a position managerial under Act 111. Those criteria are as follows:

Policy Formulation - authority to initiate departmental policies, including the power to issue general directives and regulations;

³ The Borough did not except to the Hearing Examiner's decision concerning the Chief's lack of independent authority over policy formulation, policy implementation, overall personnel administration responsibility, and independence in public relations. 34 Pa. Code § 95.98(a)(3) ("[a]n exception not specifically raised shall be waived.").

Policy Implementation - authority to develop and change programs of the department;

Overall Personnel Administration Responsibility - as evidenced by effective involvement in hiring, serious disciplinary actions and dismissals;

Budget Making - demonstrated effectiveness in the preparation of proposed budgets, as distinguished from merely making suggestions with respect to particular items;

Purchasing Role - effective role in the purchasing process, as distinguished from merely making suggestions;

Independence in Public Relations - as evidenced by authority to commit departmental resources in dealing with public groups.

Id., 522 A.2d at 704. Performance of one of the six criteria is sufficient to find managerial status. Elizabeth Township, 37 PPER 90 (Final Order, 2006). The burden of proving that a position meets one of the managerial criteria under Star Lodge is on the party seeking to exclude the position from the bargaining unit. Plains Township, 24 PPER ¶ 24081 (Final Order, 1993); State System of Higher Education, 29 PPER ¶ 29234 (Final Order, 1998). Thus, here, the Borough had the burden to prove that the position of Chief of Police satisfies one of the six criteria of managerial status. The Board has held that testimony of a witness with direct knowledge of actual duties performed must be presented to exclude a position from the certified unit under one of the statutory exclusions under PERA. Exeter Township v. PLRB, 211 A.3d 752 (Pa. 2019).

Concerning the Chief of Police's authority in the budget-making process, the Borough asserts that a budget regularly submitted to council by a police chief and ultimately approved, despite minor, unsubstantial changes to singular line items, meets the budget-making requirement of Star Lodge. However, the Borough recognizes that the "most important factor is often that the employee prepares and submits a budget reflecting the **employee's own decisions and priorities...**" (Borough's Brief at 4) (emphasis added).

Here, Council Member Miller stated that the Chief prepared the budget for Council's review and that Council rarely adjusted line-item amounts. However, it is unclear to what extent the Chief's decisions, priorities, and recommendations were put forth and accepted in the budget, as the record is lacking substantial, credible evidence that the Mayor delegated budget-making authority to the Chief of Police. Indeed, it cannot be discerned from the record what influence, if any, the Mayor had over the budget process. Further, Council Member Miller stated that he did not discuss the Mayor's delegation of, or lack of, authority and discretion to the Chief with the Mayor prior to the hearing. Also, the Borough did not produce any documentation to reflect the interaction between the Mayor and the Chief concerning who retained authority over the Police Department. To qualify as managerial under Star Lodge, the position must "demonstrate effectiveness in the preparation of proposed budgets, as distinguished from **merely making suggestions...**" Star Lodge, *supra*, 522 A.2d at 704 (emphasis added). The record does not reflect any substantial, competent evidence that the Chief exercises independent discretion and authority in budget making and, therefore, the Hearing Examiner properly concluded that the Borough failed to demonstrate as such.

With regard to the Chief's authority in the purchasing process under Star Lodge, the Borough asserts that the Chief is responsible for making all purchases for the police department, including vehicles, uniforms, and daily Department needs. The Borough further argues that the Chief's advisory role in recommending substantial purchases, such as vehicles, to Council for final approval meets the criteria under Star Lodge to prove managerial status.

However, as previously stated above, Council Member Miller was unable to testify to the Mayor's control over the Chief or delegation of authority to the Chief concerning purchases. It is unknown if the Mayor recommends purchases to the Chief that the Chief then conveys to Council for final approval or if the Chief independently recommends purchases because the Mayor has delegated such authority to the Chief. By not presenting any other witness with direct knowledge, the Borough failed to meet its burden of providing substantial and competent evidence of the Chief's actual job duties concerning purchases for the Department. Therefore, the Borough has not met the purchasing-role criteria of the Star Lodge test.

Additionally, the Borough argues that the Hearing Examiner erred in finding that Council Member Miller does not have actual first-hand knowledge of the Police Chief's job duties, including authority and discretion.⁴ It is the function of the hearing examiner, who is in a position to view the witnesses' testimony first-hand, to determine the credibility of witnesses and to weigh the probative value of the evidence presented at the hearing. Mt. Lebanon Education Association v. Mt. Lebanon School District, 35 PPER 98 (Final Order, 2004). The hearing examiner may accept or reject the testimony of any witness in whole or in part. Pennsylvania State Corrections Officers Association v. Commonwealth of Pennsylvania Department of Corrections Pittsburgh SCI, 34 PPER 134 (Final Order, 2003). The Board will not disturb the Hearing Examiner's credibility determinations absent the most compelling of circumstances. Id.

In this case, the Hearing Examiner found that Council Member Miller lacked "first-hand knowledge of the Former Chief's or Acting Chief's alleged discretionary authority to independently initiate, develop, implement, or execute the Star Lodge functions on his own without acting at the direction or under the authority of the Mayor." (POD at 4). Indeed, Council Member Miller only could testify to **his** knowledge about the Chief and the budget but could not testify as to the Mayor's involvement.⁵ Therefore, the Borough failed to present substantial, competent evidence that the Chief was delegated independent managerial authority by the Mayor necessary to determine if the position meets the Star Lodge criteria. See Rome Township, 40 PPER 54 (Order Directing Submission of Eligibility List, 2009) (employer failed to prove supervisory or managerial exclusion because witness lacked first-hand knowledge of Roadmaster duties and conceded they were unaware of "delegated independence in discretion and decision making authority" or acted at the direction of a supervisor); Bucks County Rangers Benevolent

⁴ The Hearing Examiner determined that the Mayor or Chief of Police were needed to testify to determine the Mayor's involvement in the budget process, however, any witness with first-hand knowledge would be sufficient. Here, the witness the Borough presented did not possess such first-hand knowledge.

⁵ When questioned who was responsible for preparing the budget for council's review, Council Member Miller responded, "**To my knowledge**, it was always in the chief's hands." (N.T. at 27) (emphasis added).

Association v. Bucks County, 48 PPER 25 (Proposed Decision and Order, 2016) (witness's testimony was found not competent because witness "did not possess first-hand knowledge" and testified solely to their "understanding").

After a thorough review of all matters of record, the Hearing Examiner did not err in concluding that the Borough failed to sustain its evidentiary burden of establishing that the position of Chief of Police exercised budget making or engaged in a purchasing role. As such, on this record, the Borough failed to sustain its burden of proving that the position of Chief of Police must be excluded from the certified unit as a manager under the Star Lodge test. Accordingly, the Borough's exceptions shall be dismissed and the May 17, 2023 decision of the Hearing Examiner to dismiss the petition shall be sustained.

ORDER

In view of the foregoing and in order to effectuate the policies of the Pennsylvania Labor Relations Act and Act 111, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed to the above captioned matter are hereby dismissed, and the May 17, 2023 Proposed Order of Dismissal be and hereby is made absolute and final.

SEALED, DATED, and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, James M. Darby, Chairman, Albert Mezzaroba, Member, and Gary Masino, Member, this twenty-first day of November, 2023. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.